Supreme Court, U.S.
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No. 92-___

In The

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,

Petitioner,

vs.

JOE RIOS, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR WRIT OF CERTIORARI

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March 8, 1992

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether instructions at the punishment phase of a capital murder trial, instructing jurors to consider all mitigating evidence in determining whether the defendant acted deliberately and might be dangerous in the future, and which in addition defined the term deliberately, provided a reliable means for jurors to give mitigating effect to evidence of the defendant's mental retardation.

II.

Whether evidence of the defendant's mental retardation, which as presented was not "two edged" or aggravating in nature, could be given mitigating effect by jurors under Texas capital penalty issues which required jurors to determine whether the defendant had acted deliberately and might be dangerous in the future.

III.

Whether States can confine jury consideration of evidence of a capital murder defendant's mental retardation to the issues of whether the defendant had acted deliberately and might be dangerous in the future.

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JOE RIOS, JR.,

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in the above case on October 28, 1992.

OPINION AND ORDERS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Texas, reversing this case, *Joe Rios, Jr. v. State of Texas,* No. 70,983, ___ S.W.2nd ___ (Tex. Crim. App. Oct. 28, 1992) is

reproduced in the Appendix. (1a-17a) It is not yet reported.

The order of the Court of Criminal Appeals, denying the State's Motion for Rehearing in the above case, dated December 9, 1992, is reproduced in the Appendix. (18a) It is not reported.

The order of the Court of Criminal Appeals, dated January 4, 1993, granting the State's Motion to Stay the Mandate is reproduced in the Appendix. (19a) It is not reported.

JURISDICTION

The Court of Criminal Appeals of Texas rendered its decision on October 28, 1992. A timely filed State's Motion for Rehearing was denied on December 9, 1992. (18a) This petition for writ of certiorari is filed within ninety days after final judgment. The same issues indicated in the Questions Presented have been raised at every level and stage of these proceedings. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII of the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV, Section 1 of the United States Constitution provides in pertinent part that:

> nor shall any State deprive any person of life, liberty, or property without due process of law. . . .

The provisions of Article 37.071 of the Texas Code of Criminal Procedure, in effect at the time of respondent's trial are set out in the Appendix. (32a-34a) The provisions of Sections 19.02 and 19.03 of the Texas Penal Code, under which respondent was prosecuted for capital murder, are also set out in the Appendix. (35a)

STATEMENT OF THE CASE

The respondent, Joe Rios, Jr., was indicted for the offense of capital murder. The indictment alleged in three counts that respondent had committed four murders, two committed in the same criminal transaction; a third committed on another date; and the fourth on yet another date. The trial court submitted instructions as to only the first two homicides to the jury, which found the respondent guilty as charged in the first count in the indictment. The Court of Criminal Appeals rejected the respondent's allegation of insufficient evidence, finding that all four murders had been proven. (1a-9a)

At the punishment phase of his trial, the respondent produced evidence that he was mildly mentally retarded. The evidence also showed that respondent functioned at the level of a second or third grader, had the mental age of an eight or nine year old, and had a developmental reading disorder. Other testimony indicated that the

respondent was illiterate, had a speech impediment, and had no concept of money. (10a-11a)

Dr. James Sherman, a psychologist called by the respondent, testified that the mildly mentally retarded were educable and could function in society, but only to a limited degree. The doctor also stated that to a limited degree, the mentally retarded could control their actions in regards to moral decisions, but had "a limited amount of judgment and reflection." (R.XVII-1562-1563) Sherman also testified that the respondent had an "under socialized, non-aggressive conduct disorder." (R.XVII-1565) But Sherman testified that mental retardation alone was not determinative whether a subject would have a conduct disorder. (R.XVII-1569)

Patrick Hopkins, who holds a masters in psychology and eleven years experience working with the mentally retarded, was employed by the county mental health and mental retardation center. Hopkins testified that the mentally retarded "in many ways are more like us than different from-from other people." (R.XVIII-1678,1687) Because of their limited intelligence, however, the mentally retarded were more dependent upon other people and more easily manipulated by or deceived by others. The mentally retarded have a limited ability to make judgments, and need the guidance and assistance of others. (R.XVIII-1677-1683,1685-1687) Again, because of their limited ability to cope and make sound judgments, the mentally retarded may handle stressful situations by acting out in anger or frustration or running away from the situation. (R.XVIII-1681-1682) Nonetheless, Hopkins stated that the mentally retarded were not necessarily more prone to be violent, although their judgment was

not as good as those who were not retarded and they "might" be more frequently diagnosed in adolescence as having conduct disorders. (R.XVIII-1687-1694,1714)

Additionally, Hopkins testified that the mildly mentally retarded could be helped in a process of supervised training and instruction or "habilitation" over a long period of time, and cited a residential program for the mentally retarded he helped direct. Hopkins stated that many families could not provide this sort of assistance to the retarded. (R.XVIII-1684-1685,1687-1689)

Dr. Wendel Dickerson, a psychologist who once served as the chief mental health officer in the Texas Department of Corrections (R.XVIII-1715-1717), testified that violence by the mentally retarded was "quite low" and "extremely unusual." (R.XVIII-1735,1753) Dickerson also stated that the prevalence of violence decreased with the age of the offender, and that the recidivism rate for murder was low. (R.XVIII-1734,1735) Dickerson stated that the Texas prison system had an excellent facility for the mentally retarded, in which aggressive behavior was controlled and diminished, over time. (R.XVIII-1736-1739, 1754-1756) But previously in units such as where the respondent had been incarcerated, programs for the retarded were limited, and in fact the mildly mentally retarded were often unidentified as such. (R.XVIII-1756-1760) Indeed, two prison guards who had been called to testify by the State, testified they had not realized the respondent was retarded. (R.XVIII-1515-1516, 1529-1530)

The trial court submitted two special issues to the jury, requiring the State to establish beyond a reasonable

doubt that the respondent had deliberately caused the death of the first victim named in the indictment, and that there was a probability that the respondent would commit criminal acts of violence in the future and thus constitute a continuing threat to society. (21a) Additionally, in part tracking an instruction requested by the respondent (11a-12a), the trial court instructed the jury that evidence they considered to be mitigating, including any aspect of the respondent's reputation, character or record, or any circumstances of the offense, could provide a basis for answering either special issue "no." (22a)

Although not required to do so by Texas law, the trial court submitted a definition of the term "deliberately." The trial court informed the jurors that the term had a meaning different and distinct from intentional, and along with resubmitting a definition of intent, required that the State prove that respondent's conduct was committed "with careful consideration or deliberation; with full intent; not hastily or carelessly-as a deliberately formed purpose; with awareness of the consequences." (20a-21a)

The trial court, however, refused to submit the respondent's specially requested instructions that authorized jurors to assess a life sentence on the basis of respondent's mitigating evidence, in particular evidence of his mental retardation, regardless of their answers to the special issues. (26a-31a) The respondent also objected on the basis of *Penry v. Lynaugh*, 492 U.S. 302 (1989) to the omission of an instruction on mental retardation as a mitigating factor. (R.XIX-1820-1821)

In closing argument, one of respondent's counsel urged that the respondent, because of his limited intellectual capacity, was not able to act with the "deliberateness that you and I know, which is now, we are told, more than intentional . . . " (R.XIX-1837-1838) Respondent's other trial counsel urged that the Texas prison system had a facility that could help a mentally retarded offender such as the respondent, but that in his previous incarceration in the system, the respondent's retardation had not even been recognized as such by the guards. (R.XIX-1842-1843,1845) The prosecutors argued that the respondent's conduct indicated he had acted deliberately, regardless of his mental retardation. (R.XIX-1822-1826, 1850-1851) Both prosecutors argued that the evidence of respondent's record of violent behavior merited a "yes" answer to the second special issue, and that even if the prison system had a unit for the mentally retarded, the respondent would still pose a danger to guards and inmates. (R.XIX-1826-1833,1852-1854)

The jury subsequently returned "yes" answers to both special issues. (24a) Pursuant to the Texas capital sentencing statute, the trial court sentenced the respondent to death. (32a-34a)

Relying on this court's opinion in *Penry v. Lynaugh*, supra, the respondent urged in the Texas Court of Criminal Appeals that the jury instructions did not provide a sufficient vehicle for the jury's consideration of the evidence of respondent's mental retardation. That Court found that one of the respondent's specially requested instructions refused by the trial court, was sufficient to preserve his contention for review. (9a,12a-13a) The Court recited the evidence concerning the respondent's mental

retardation and impaired intellectual functioning, and set out the trial court's instruction that the jury could use the mitigating evidence as a basis for a reasonable doubt in answering the special issues. (10a-12a) The Court of Criminal Appeals made no reference to the trial court's definition of "deliberately," although the court had been apprised by the State in it's brief on direct appeal, that the definition had been submitted. Similarly, the Court made no reference to the evidence that the mentally retarded had a limited capacity to make sound or considered judgments, nor to the evidence concerning the "habilitation" of the mentally retarded or the facilities in the Texas prison system for the mentally retarded.

The Court of Criminal Appeals declared that the respondent "unquestionably" was entitled to an additional mitigating evidence instruction empowering the jury to assess a sentence of life "notwithstanding" their answer to the penalty issues. (11a) The Court found that the instruction given by the trial court was not sufficient to apprise the jurors that they could assess a life sentence in response to evidence of mental retardation, irrespective of the answers to the issues (14a), and that it did not clearly communicate:

> That evidence that has no rational bearing whatsoever on special issues, or has only a tendency to militate in favor of affirmative answers, may nevertheless, if it has independent mitigating impact, serve as the basis for answering one or more of the special issues "no," in spite of the juror's oaths to answer special issues honestly, and in accordance with what they believed the relevant evidence shows . . . (14a)

The Court stated that the instructions did not explain to jurors how they could use evidence of mental retardation to assess a punishment less than death when it was irrelevant to the deliberateness of the defendant's conduct, and tended to establish his future dangerousness. (14a)

The Court of Criminal Appeals concluded that there was a reasonable likelihood that instructions submitted by the trial court did not adequately inform the jurors that they could give effect to evidence of respondent's mental retardation apart from the special issues. The Court, therefore, concluded that the instructions did not adequately protect the respondent's Eighth Amendment rights. (16a-17a)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

Whether instructions at the punishment phase of a capital murder trial, instructing jurors to consider all mitigating evidence in determining whether the defendant acted deliberately and might be dangerous in the future, and which in addition defined the term deliberately, provided a reliable means for jurors to give mitigating effect to evidence of the defendant's mental retardation.

II.

Whether evidence of the defendant's mental retardation, which as presented was not "two edged" or aggravating in nature, could be given mitigating effect by jurors under Texas capital penalty issues which required jurors to determine whether the defendant had acted deliberately and might be dangerous in the future.

The first two questions presented in the petition concern the Court of Criminal Appeal's application of *Penry v. Lynaugh,* supra, which is in direct conflict with this Court's latest and most authoritative interpretation of *Penry* in *Graham v. Collins,* 113 S.Ct. 892 (U.S. 1993). The Court of Criminal Appeals erroneously addressed the respondent's contention by treating his case as a virtual carbon copy of *Penry.* More importantly, *Graham* has substantially narrowed the exception that *Penry* made to the general rule that the special issues submitted at the punishment phase of Texas capital murder trials provided an adequate vehicle for jury consideration of mitigating evidence.

The special issue system employed at respondent's trial (32a-34a) was substantially revised by the Texas Legislature in 1991. But the effect of the holding in *Penry,*

as construed by *Graham* and subsequent cases, is very much an active concern for this Court and the lower federal and Texas state courts that look to this Court for guidance. The changes in the capital sentencing procedures as a result of the 1991 amendment, apply only to offenses committed on or after September 1, 1991. *See Graham v. Collins*, 950 F.2d 1009, 1112 n.1. (5th Cir. 1992) (en banc) Perhaps as many as three hundred forty defendants have been convicted and sentenced to death under the pre-amendment issue system.[1] These defendants will doubtless continue to attack the validity of their convictions by direct appeal, state writ of habeas corpus, and federal writ of habeas corpus. The Court of Criminal Appeals of Texas alone has reversed several cases or granted post conviction relief on the basis of *Penry* claims.[2] Any successful claimant would have to be tried under pre-amendment procedures.

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[1] U.S. Department of Justice, Office of Justice Programs. Bureau of Justice Statistics Bulletin: Capital Punishment 1991, at p.1 (October 1992). The figure is as of December 31, 1991. *Id.* It would seem improbable that many, if any, of the three hundred forty were tried and convicted under the new statute, since offense, arrest, investigation, indictment, trial and conviction would have had to all transpired within a five month period.

[2] *See First v. State*, No. 69,832, ___ S.W.2d ___, slip op. at pp.2-9 (Tex.Crim.App.1992); *Richard v. State*, 842 S.W.2d 279 (Tex.Crim.App.1992); *Ex Parte Williams*, 833 S.W.2d 150 (Tex.Crim.App.1992); *Ex Parte McGee*, 817 S.W.2d 77 (Tex.Crim.App.1991); *Ex Parte Goodman*,816 S.W.2d 383 (Tex.Crim.App.1991); *Ramirez v. State*, 815 S.W.2d 636 (Tex.Crim.App.1991); *Gribble v. State*, 808 S.W.2d 65 (Tex.Crim.App.1990).

The best evidence that *Penry* continues to raise disputed legal issues for this Court's resolution, is the fact that barely a month after *Graham*, on February 19, 1993, this court granted a petition for writ of certiorari in *Johnson v. Texas*, No.92-5653, to determine in part whether the Texas special issues "precluded the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?" The petitioner in this case can only presume that *Johnson* will be decided in a manner consistent with *Graham*. Certainly, the court's decision to revisit *Penry* so soon in the wake of *Graham*, indicates that *Penry v. Lynaugh* and it's further application, are still subject to further reexamination.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court sustained a claim that the special issues as applied in the case of a capital murder defendant who produced evidence of his mental retardation and abused childhood, were unconstitutional because they did not afford the jury a means of fully considering and giving mitigating effect to that evidence. The *Penry* majority found that the mitigating evidence fell outside the scope of the deliberateness issue, particularly since no definition of that term was submitted to the jury; and would tend to support a finding that Penry would pose a danger of criminal violence in the future, because the evidence established that his disability rendered him incapable of learning from his mistakes. The jury therefore could not use the mitigating evidence as a basis for assessing a sentence less than death, or in other words, did not have a vehicle for

expressing its reasoned moral response to the evidence.[3] *Id.* at 322-328.

Penry addressed an allegation that the special issue system was unconstitutional as applied. This Court held in *Jurek v. Texas,* 428 U.S. 262(1976) that the sentencing procedures in the Texas statute were facially constitutional. This Court has set two, potentially disparate requirements for a constitutional capital sentencing procedure. States must both limit the discretion of trial courts and juries to impose the death penalty in order to prevent the arbitrary and capricious infliction of death; and still permit the sentencer sufficient discretion to decline to impose the death penalty on the basis of the defendant's character and record and the circumstances of his offense. *See Franklin v. Lynaugh,* 487 U.S. 164, 181-182 (1988); *California v. Brown,* 479 U.S. 538,541 (1987). But the Texas sentencing system had been repeatedly sustained as a procedure that satisfied both requirements, and also provided a sufficient means for consideration of mitigating evidence. *See Franklin v. Lynaugh,* supra at p.182, n.11.

Under *Penry,* the Texas sentencing scheme might fail in two instances. First, evidence might have mitigating significance independent or apart from the scope of a special issue. Secondly, evidence could have mitigating

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[3] The *Penry* court also found that the third, or provocation issue, did not provide a vehicle for considering and giving effect to the mitigating evidence. But the third special issue was not submitted, nor was it ever requested that it be submitted in the instant case, and therefore has no bearing on the resolution of the question presented.

significance, but yet tend to support an affirmative answer to the special issues. In either instance, the application of the Texas special issue system would be subject to a successful challenge under the Eighth Amendment, as applied to the States under the due process clause of the Fourteenth Amendment, for failing to provide a vehicle for the jury's consideration of the mitigating evidence.

The Court of Criminal Appeals essentially found that the special issues failed in the instant case in precisely the same manner as they had in *Penry*. The evidence of mental retardation would have significance beyond the first issue, and would have tended to support an affirmative answer to the second issue. The Court of Criminal Appeals noted the lack of a mechanism for giving mitigating effect to the respondent's mental retardation "irrespective of" or "in spite of" or "apart from" the special issues. (14a,16a)

The Court of Criminal Appeals' application of *Penry v. Lynaugh* is highly suspect. Unlike the trial court in *Penry*, the trial court in the instant case submitted a definition of "deliberately," as well as explicitly informed the jury that it could use mitigating evidence in answering the special issues "no." (20a-22a) The respondent's mitigating evidence was relevant to the definition of deliberately, tending to show that respondent was less able because of his mental retardation to exhibit careful consideration, and to act other than hastily or carelessly, or to possess an awareness of the consequences of his conduct. Moreover, unlike Penry's evidence, the evidence of respondent's mental retardation was not two edged. The testimony of respondent's experts demonstrated that if anything, the mentally retarded are not particularly

violence prone. Significantly, the respondent's mitigating evidence did tend to support a negative answer to the second, future dangerousness issue. The jury could have given effect within the second issue to that evidence which showed that a structured program or environment could successfully "habilitate" the mentally retarded; that violent or anti-social behavior by the mentally retarded could be contained and reduced in the appropriate program; and that the Texas prison system had a unit with such services for the mentally retarded. The evidence also demonstrated that the respondent's mental retardation had not even been recognized, let alone addressed during his previous incarceration in the Texas prison system.

The Court of Criminal Appeals' opinion therefore was not dictated by *Penry*. But this Court is not a court of errors to correct erroneous decisions of any state's highest court. However, this petition is predicated on the opinion's conflict with this Court's recent decision in *Graham v. Collins*, supra.[4]

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[4] The petitioner would note that on direct appeal in the Court of Criminal Appeals, it relied substantially on the en banc opinion of the Fifth Circuit in *Graham v. Collins*, 950 F.2d 1009, 1027-1028 (5th Cir.1991) in which it was held that under *Penry* an additional mitigating evidence instruction was not required when the "major thrust" of the mitigating evidence could be given effect within the special issues. The petitioner based its motion for a stay of mandate on the patent conflict between the Court of Criminal Appeals' opinion and the Fifth Circuit's holding in *Graham*, and also noted that *Graham* was pending in this Court. This Court's opinion in *Graham* was delivered three weeks after the stay of mandate in this cause.

The issue in *Graham* was whether evidence of a capital murder defendant's youth, family background, and positive character traits could be given effect by the jury under the special issues. Much of the opinion addresses whether Graham was seeking a "new rule" and, if so, whether his claim fell within two exceptions to the bar on granting relief on federal collateral review on the basis of such a rule. *See Graham v. Collins, supra,* 113 S.Ct. at 895-898, 903. But in addressing those issues, the Court reviewed some twenty years of capital sentencing jurisprudence from *Furman v. Georgia,* 408 U.S. 484 U.S. 238 (1972) through *Penry. See Graham v. Collins,* supra, 113 S.Ct. at 898-903. The Court's treatment of *Penry* is dispositive of this petition.

The Court declared that *Penry* had not made a "sea change" in the law, and did "not broadly suggest the invalidity of the special issues framework." *Id.* at 901. The Court noted that *Penry* had after all not established a "new rule." The Court relied upon *Saffle v. Parks,* 494 U.S. 484, 491 (1990), in which it was said that *Penry* addressed those cases in which the jury could not give "any mitigating effect" to evidence within the issues. *Id.*

The Court went on to conclude that its mitigating evidence cases had found constitutional violations when a procedure had placed a defendant's relevant mitigating evidence "beyond the effective reach of the sentencer," and that in *Penry* this violation resulted from the jury having "no reliable means of giving mitigating effect" to the mitigating evidence. *Id.* But in *Graham,* the "mitigating evidence was not placed beyond the jury's effective reach," because trial counsel had presented and argued the evidence within the confines of the issues and the

jury could have returned "no" answers on the basis of the mitigating evidence and would have acted "consistent with its instructions." Specifically, the jurors could have concluded from evidence of Graham's youth, background, and character, that his criminal activity was an "aberration" and found for the defendant in its answer to the second issue. *Id.*

Graham's contention that his mitigating evidence had significance beyond the scope of the first issue was dismissed by the Court:

> Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence – *unlike* Penry's – had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer. This distinction leads us to conclude that *Penry* nor any of its predecessors *"dictates"* the relief Graham seeks. . . .
>
> *Id.* (emphasis in original)

Thus, if one of the issues provides a vehicle for consideration of mitigating evidence, it is immaterial that the other issues do not.

But even if the mitigating evidence has some significance beyond the scope of the issues, an additional mitigating evidence instruction is not required:

> As the dissent in *Franklin* made clear, virtually *any* mitigating evidence is capable of being viewed as having some bearing on the

> defendant's "moral culpability" apart from its relevance to the particular concerns embodied in the Texas special issues. See *Franklin*, 487 U.S., at 190 (STEVENS, J., dissenting). It seems to us, however, that reading *Penry* as petitioner urges – and thereby holding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues – would be to require in all cases that a fourth "special issue" be put to the jury: " 'Does any mitigating evidence before you, whether or not relevant to the above [three] questions, lead you to believe that the death penalty should not be imposed?' " The *Franklin* plurality rejected precisely this contention, finding it irreconcilable with the Court's holding in *Jurek*, see *Franklin*, 487 U.S., at 180, n.10, and we affirm that conclusion today. . . .
>
> *Id.* (emphasis in original)

The analysis of the respondent's Eighth Amendment claim by the Court of Criminal Appeals of Texas cannot be reconciled with this Court's reasoning in *Graham*. Clearly, the respondent's evidence of mental retardation was not "beyond the effective reach" of the sentencing jury. With the definition of "deliberately" supplied by the trial court, the evidence as presented could be considered and given effect to under the first special issue. Similarly, the evidence "readily could have supported a negative answer" to the second special issue, and had not "compelled an affirmative answer." The instructions at respondent's trial provided a "reliable means" for the consideration of mitigating evidence.

Moreover, the Court of Criminal Appeals repeatedly spoke of evidence having mitigating significance apart from, in spite of, or notwithstanding answers to the special issues. But under *Graham*, even if evidence has "some" significance beyond the scope of the special issues, an additional mitigating evidence instruction is not required. This Court limited *Penry* to cases in which evidence could not be given "any" mitigating effect under the special issues.

The Petitioner, therefore, urges that the conflict between the opinion below and the decision in *Graham v. Collins* merits this Court granting the first two questions presented for review. The Court should either address the questions presented, or remand this case to the Court of Criminal Appeals to address the respondent's contentions in light of *Graham*.[5]

III.

Whether States can confine jury consideration of evidence of a capital murder defendant's mental retardation to the issues of whether the defendant had acted deliberately and might be dangerous in the future.

The third question presented for review by the petitioner, effectively raises the question of whether *Penry v. Lynaugh* should be overruled outright. This Court's opinion in *Graham* construed *Penry* in a narrow manner which some observers might hazard to say leaves little of the substance of that opinion remaining. Justice Souter in his

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[5] As noted earlier, the same result should occur if *Johnson v. Texas*, supra is decided in a manner consistent with *Graham*.

dissent in *Graham* quoted Justice Scalia's dissent in *Penry* for the proposition *Penry* did require an additional instruction if evidence had any mitigating significance beyond the scope of the special issues. *See Graham v. Collins,* supra, 113 S.Ct. at 920-921 (Souter, J. dissenting) (citing *Penry v. Lynaugh,* 492 U.S. 302, 355 (1989) (Scalia, J., dissenting)).

A conscientious reading of the *Penry* majority's statements that jurors must be able to "consider fully" mitigating evidence and that evidence could have mitigating significance "beyond the scope of the issues," *See Penry v. Lynaugh,* supra at pp. 322-323, could well lead to the conclusion that Justice Souter is correct. Yet, this Court has effectively repudiated *Penry* by holding that merely because evidence had "some" significance beyond the scope of the issues, an additional instruction is not required. This court should consider expressly repudiating *Penry.*

The *Graham* majority cited with approval the plurality opinion in *Franklin v. Lynaugh,* supra. The plurality in *Franklin* also held that "states are free to structure and shape consideration of mitigating evidence" in order to guarantee a more rational system of capital sentencing. *See Franklin v. Lynaugh,* 487 U.S. 164, 181 (1988). Similar sentiments were echoed in other opinions of this Court in 1990. *See Saffle v. Parks,* supra; *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 3056, 111 L.Ed.2d 511 (1990); *Boyde v. California,* 494 U.S. 370 , 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990). This solicitude towards the power of States to guide or channel jury considerations of mitigating evidence seems difficult to harmonize with *Penry.*

The State, therefore urges this Court to grant the third question presented for review and to consider whether *Penry v. Lynaugh* ought not be overruled. That opinion is an anomaly in light of the long line of cases which have held that the Texas penalty issue system satisfies the dictates of the Eighth Amendment, as well as those cases which permit States to guide or channel jury consideration of mitigating evidence. This Court has at any rate severely constricted the applicability of *Penry* in its opinion in *Graham*. This Court should consider whether the coherence of its capital sentencing jurisprudence might be better served by dispensing with *Penry* altogether.

CONCLUSION

For these reasons, Petitioners prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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JOE RIOS, JR., Appellant

NO. 70,983 v. – – – Appeal from BEXAR County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of murder of more than one person during the same transaction, a capital offense under V.T.C.A. Penal Code, §19.03(a)(6).[1] The jury answered special issues affirmatively, and punishment was assessed accordingly at death. Article 37.071, V.A.C.C.P. Appeal to this Court is automatic. *Id.*, §(h).

In his first two points of error appellant challenges the sufficiency of the evidence to show he is responsible for the multiple killings in this cause, and that the killings occurred during the same criminal transaction. The evidence that appellant perpetrated the killings is circumstantial. Appellant does not challenge sufficiency of the evidence at the punishment phase.

The grand jury returned a three count indictment in this cause. The first count alleged appellant intentionally

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[1] §19.03(a)(6), supra, reads:

"(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

* * *

(6) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

caused the death of two individuals, Alex Delgado and Robert Torres, during the same criminal transaction. §19.03(a)(6)(A), supra. Count two alleged appellant intentionally caused the deaths of Delgado and Torres, and that during the same scheme or course of conduct he also intentionally caused the death of a third individual, Rosalio Ruiz. §19.03(a)(6)(B), supra. In the third count it is alleged, in addition to what is alleged in the second count, that during the same scheme and course of conduct appellant also intentionally caused the death of a fourth individual, Jorge Rangel. All four killings were proven at trial. After all the evidence was presented at the guilt phase, the State elected to proceed on the first count alone. Accordingly, the jury was instructed that in order to convict for the offense of capital murder, it must find appellant intentionally caused the deaths of Delgado and Torres, and that he perpetrated these two killings during the same criminal transaction. The jury was also instructed it could consider extraneous offenses to the extent they have a bearing on the issues of identity and intent. Appellant maintains the evidence fails to establish he committed the killings, or that they were committed during a single criminal transaction. The facts, viewed in the light most favorable to the jury's verdict, are as follows.

The bodies of Delgado and Ruiz were discovered close together on the grounds of St. John's Lutheran Cemetery in San Antonio at about 7:30 a.m. on August 17, 1987. According to the medical examiner, by that time they had been dead at least 24 hours. Delgado had been shot once in the head with a .22 caliber weapon. Torres had been shot three times in the head with a weapon of

the same caliber. Each man's pockets had been turned out. Torres' zipper was open and his pants partially pulled down. Two spent .22 caliber shell casings were found at the scene. Both men had last been seen alive in the company of appellant sometime after 11:30 p.m. on the night of August 15, 1987, in a white van appellant had borrowed from his girlfriend's father. Earlier that evening appellant was seen handling a small caliber automatic pistol, and had fired at least one round out of the window as he was driving the van. A .22 caliber shell casing was later discovered on the floorboard beneath the driver's seat in the van.

The firearms examiner testified that, although he could not "positively say," it was his opinion, judging from a rare rifling pattern present on all of the four bullets recovered from the bodies of Delgado and Torres, that each had been fired from the same gun. That gun, he opined, was a Tanfoglio GT22 or FIE E22.[2] He was able positively to say that the three spent shell casings were all fired from the same weapon, also a Tanfoglio.[3]

On the morning of August 23, 1987, the body of Rosalio Ruiz was discovered just outside the grounds of the Alamo Lodge Masonic Cemetery, near St. John's Lutheran Cemetery. Ruiz had been shot twice in the head with a .22 caliber pistol. Abrasions on the body indicated it had been dragged. His pockets were turned out and his pants "pulled down slightly." Within the grounds of the

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[2] He testified that the GT22 and FIE E22 are "the same gun, just marked differently."

[3] The actual murder weapon was never recovered.

cemetery was a 1974 Oldsmobile Toronado with a recent bullet hole through the windshield. Appellant's fingerprints were lifted from outside of the driver's side door of the Toronado, and from the roof on the driver's side. One spent shell casing was discovered inside the car. Another was found on the cemetery grounds. The firearms examiner testified that these shell casings had been fired from the same .22 caliber Tanfoglio that had fired the shell casings discovered at the St. John's Lutheran Cemetery and in the white van. He also opined that the bullets retrieved from Ruiz' brain were fired from the same weapon that had killed Torres.[4]

The night before, on August 22, 1987, in a neighborhood near the cemeteries, appellant had waved around a small automatic pistol, and pointed it at the forehead of an eighteen year old boy. A short distance down the street appellant was again seen playing with the gun, and he pointed it at one other person. Sometime after 10:00 p.m. he was seen to get in the front passenger side of a car driven by Ruiz. Appellant had been arguing with Ruiz, and pointing the gun at him as well. The car looked like the Toronado found the next morning at the Alamo Lodge Masonic Cemetery.[5]

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[4] The firearms examiner was not asked specifically whether the bullets that killed Ruiz emanated from the same gun as did the bullets that killed Delgado. He did testify, however, that in his opinion the slugs that killed Delgado were fired from the same gun as those that killed Torres. See text, *ante*.

[5] The Toronado belonged to Ruiz' friend, Robert Blunt. Intoxicated, Ruiz had taken the Toronado without permission a short time before appellant was seen to get into a similar car that Ruiz was driving.

The body of Jorge Rangel was found about 2:00 a.m. on August 24, 1987, in the parking lot of Pitman-Sullivan park, in the same general neighborhood. His pockets had been turned out, his pants were unzipped, and his shirt was pulled up. He had been shot once in the neck and once in the temple, and had been dead less than four hours when found. There was blood on his pants, a circumstance consistent with his having been sitting up when shot. A .22 caliber bullet was recovered from his brain. The firearms examiner concluded this bullet was fired from the same Tanfoglio used to kill Delgado, Torres and Ruiz.

Appellant was arrested on August 26, 1987, shortly after leaving his mother's residence at 1223 Virginia in a green and white Plymouth Satellite. In the Satellite police found two live .22 caliber rounds, a spent slug, and a spent shell casing. Both the slug and the shell casing were fired from the same Tanfoglio as were all the others. The slug contained traces of human blood. A quantity of blood was discovered on the front passenger side of the car. The specific blood characteristics, shared by only three percent of the population, proved consistent with Rangel's blood.

Finally, appellant's ex-wife testified that in July of 1987, appellant was living at the residence at 1223 Virginia, close to where each of the bodies was later recovered. Toward the end of July she went there to visit appellant, and an argument ensued. In the course of the argument appellant pointed a small automatic pistol at her, and fired a round into the wall. Police later removed

a bullet from the wall, and the firearms examiner concluded that it was fired from the same Tanfoglio later used in all four killings.

Every circumstantial evidence case must be tested by its own facts to determine the sufficiency of the evidence. Brasfield v. State, 600 S.W.2d 288, at 293 (Tex.Cr.App. 1980) (Opinion on original submission). Given the above facts the jury could rationally conclude appellant intentionally caused the deaths of Delgado and Torres. The same weapon was used to perpetrate all four murders. That murder weapon was shown to have been in appellant's possession several weeks prior to the killings. Appellant was seen with Delgado and Torres, brandishing a small caliber pistol, within hours of their having been found dead. He was shown to have been threatening others with a small caliber pistol on the night he met up with Ruiz, shortly before Ruiz was killed. A bullet and shell casing fired from the murder weapon were found in the car appellant was driving when arrested, and blood consistent with Rangel's was found on the passenger seat. All the bodies were left in the same general vicinity, close to appellant's home, three out of four in or just beyond cemetery grounds. All had been shot in the head. Each had had his pockets turned out and three of the four had had their clothing tampered with in a peculiar fashion. Together these facts support the conclusion that the same person perpetrated all four killings, and that appellant was that person. The evidence admits of no other reasonable hypothesis. We hold the evidence is sufficient to show appellant killed Delgado and Torres. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

We conclude also that the evidence was sufficient to support a jury finding that appellant killed Delgado and Torres "during the same criminal transaction." §19.03(a)(6)(A), supra. The Legislature did not define "criminal transaction." The trial court did not define it in the jury charge. Thus, the jury was left to common acceptation. The dictionary defines a transaction as "an act, process, or instance of transacting." Webster's Ninth New Collegiate Dictionary (1988), at 1252. "Transact," in turn, is a transitive verb meaning "to carry out: PERFORM; *esp*: to carry on." *Id*. Thus, in common acceptation, a criminal transaction must be understood as an act, process, or instance of carrying on or carrying out crime.

"Criminal transaction" is different, however, from "scheme or course of conduct" under §19.03(a)(6)(B), supra. In fact, under the statute the two are mutually exclusive. As §19.03(a)(6)(B) is drafted, one cannot be convicted of murdering more than one person in the course of the same scheme or course of conduct unless there is also proof the murders occurred during different criminal transactions. Therefore, we know the Legislature must have intended "same criminal transaction" to amount to something less than "same scheme or course of conduct." We also know, however, that "same criminal transaction" cannot be limited to conduct that violates only one statute only one time, for it takes the murder of "more than one person" under V.T.C.A. Penal Code, §19.02 to constitute capital murder *at all*, under §19.03(a)(6)(A), supra. Accordingly, we must presume the jury construed "criminal transaction" in this context to mean something like an act, process (not amounting to

same scheme or course of conduct), or instance of carrying on or carrying out murder of more than one person.

Moreover, what apparently separates a "process . . . of carrying on or carrying out" multiple murders, under §19.03(a)(6)(A), supra, from a "scheme or course of conduct" during which multiple murders are committed, under §19.03(a)(6)(B), supra, is the continuity of the killing. In Vuong v. State, 830 S.W.2d 929, at 941 (Tex.Cr.App. 1992), we construed "criminal transaction" to embrace facts showing "a continuous and uninterrupted chain of conduct occurring over a very short period of time . . . in a rapid sequence of unbroken events." Understanding "criminal transaction" in this narrowest sense, we were able to say that the statute was not unconstitutionally vague as applied to Vuong, who had proceeded methodically through a pool hall and cafe shooting people one after the other. In another context we have said that "transaction may be understood to be an uninterrupted and continuous sequence of events or assaultive acts." Rubino v. Lynaugh, 770 S.W.2d 802, at 804 (Tex.Cr.App. 1989) (internal quotes omitted) (carving doctrine). And in construing "transaction" in another statutory context, we have observed that a "criminal transaction terminates with cessation of conduct – ordinarily in a relatively brief period of time." Kalish v. State, 662 S.W.2d 595, at 600 (Tex.Cr.App. 1983) (Article 28.061, V.A.C.C.P., now defunct). In reviewing sufficiency of the evidence to show "same criminal transaction," therefore, we will look to see whether the jury could rationally conclude appellant engaged in a continuous and uninterrupted process, over a short period of time, of carrying on or carrying out murder of more than one person.

Delgado and Torres were last seen alive about 11:30 p.m. on the night of August 15, 1987, in appellant's company. They were killed sometime over the course of the next eight hours, for the medical examiner concluded they were dead by at least 7:30 the next morning. They were shot in the same manner, with the same weapon, and their bodies were deposited only a few feet apart on the cemetery grounds. Neither man had been acquainted with appellant prior to the night of their deaths. Although circumstantial, the evidence suggests no realistic scenario but that appellant carried out the murders of Delgado and Torres in a continuous and uninterrupted process over a short period of time. We hold the evidence is sufficient to convince a rational jury beyond a reasonable doubt that appellant murdered Delgado and Torres during the same criminal transaction. Appellant's first and second points of error are overruled.

By way of four points of error appellant contends the trial court erred in failing to submit at the punishment phase of trial an instruction sufficient to equip the jury to exercise its "reasoned moral response" to, *inter alia*, evidence of his mental retardation. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Appellant requested specific instructions, recounted *post*. Therefore, although this case was tried after the date of decision in *Penry*, error is preserved. Cf. Black v. State, 816 S.W.2d 350 (Tex.Cr.App. 1991) (Campbell, J., concurring, joined by five other judges).

Appellant presented some evidence of a disadvantaged background, but, measured against this Court's recent caselaw, it is not of significant mitigating value. See, e.g., Draughon v. State, 831 S.W.2d 331, at 339

(Tex.Cr.App. 1992). However, appellant also presented, and the State did not refute, testimony from two witnesses to the effect that appellant tested in the mildly retarded range. Dr. James O. Sherman, a psychologist, testified he had examined appellant in 1982, five years prior to the offense on trial. Sherman administered the Wechsler Adult Intelligent Scale, revised, to determine that appellant had an I.Q. of 66. He characterized appellant as within the range of the mildly retarded, functioning at the level of a second or third grader. Twice before, in 1979 and 1980, appellant had been evaluated as mentally retarded, with I.Q. scores of 55 and 59, respectively. Despite this apparent improvement between 1979 and 1982, Sherman testified that I.Q. "tends to remain relatively constant over time." He therefore "assume[d]" appellant's I.Q. "would be relatively the same" as of the time of trial, *viz*: within the mildly mentally retarded range.

Patrick Hopkins, the Residential Services Coordinator for the Bexar County Mental Health and Mental Retardation Center, with eleven years of experience working with the mentally retarded, also tested appellant in 1982. Appellant was deemed to have an I.Q. of 67 on the Leiter International Performance Scale, with a mental age of between eight and nine years old. This level of intelligence generally does not increase significantly as a person achieves adulthood. Like Dr. Sherman, Hopkins testified that one's level of intelligence "should be a relatively stable factor throughout one's life[.]" Specifically as to appellant he stated, "I haven't seen any additional testing or any additional information that would lead me to believe that [appellant's I.Q.] has

changed or that it would change." Hopkins concluded appellant "was mildly mentally retarded, . . . and that he had a specific developmental reading disorder." There was other testimony appellant was illiterate, had a speech impediment, and "didn't really have a concept of money."

Under Ex parte Goodman, 816 S.W.2d 383 (Tex.Cr.App. 1991), Ramirez v. State, 815 S.W.2d 636 (Tex.Cr.App. 1991), Ex parte McGee, 817 S.W.2d 77 (Tex.Cr.App. 1991), and Ex parte Williams, 833 S.W.2d 150 (Tex.Cr.App. 1992), appellant was unquestionably entitled to an instruction empowering the jury to assess a penalty less than death, notwithstanding affirmative answers to the special issues, as a "reasoned moral response" to the fact of his mental retardation. The only remaining question is whether the trial judge gave a sufficient instruction in this post-*Penry* case. In our view he did not.

Appellant requested the trial court to submit a number of instructions to the jury at the conclusion of evidence at the punishment phase of trial. His first requested instruction reads:

> "You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the defendant's reputation, character, or record, any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is 'Yes'; and in the event such

> evidence does so cause you to have such a reasonable doubt, you should answer the Issue 'No.' "

The trial court did in fact give this instruction to the jury. Appellant requested an additional instruction by which the jury would have been able expressly to indicate, in answer to a fourth special issue, whether "the mitigating circumstances of Defendant's mental retardation should result in a sentence of life." Although appellant's requested instruction number twenty, reproduced in the margin, is not a model, it was sufficient to alert the trial court to appellant's wish to have the jury make explicit its reasoned moral response to the fact of his mental retardation.[6] Believing that appellant's first requested instruction

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[6] Appellant's requested instruction number twenty reads:

> "1. When you deliberate about the questions posed in the Special Issues, you must consider any mitigating circumstances supported by the evidence presented in both phases of the trial. In this case, there was presented to you evidence that the Defendant was mentally retarded. You may consider such evidence as a mitigating circumstance in deciding the answers to the Special Issues.
>
> 2. A mitigating circumstance is any aspect of the defendant's character and record or the circumstances of the crime which, in fairness or mercy, calls for a sentence less than death.
>
> 3. You may deliberate as a body about mitigating circumstances but, you are not required to reach an unanimous verdict as to it's [sic] existence or weight.
>
> You are instructed that when you vote about whether mitigating circumstances exist and, if so, how much weight they deserve, you may vote 'yes' if ten or more jurors believe that the mitigating circumstances exist or if ten or more jurors have a reasonable doubt that they exist.

was sufficient to protect appellant's Eighth Amendment rights under *Penry,* the trial court refused this further instruction.[7]

You are further instructed that when you vote about whether mitigating circumstances should result in a sentence of life you may vote 'yes' if ten or more jurors believe that the mitigating circumstances required a sentence of life or if ten or more jurors have a reasonable doubt thereof.

4. We the jury find that the evidence of Defendant's mental retardation is a mitigating circumstance.

_____ YES _____ NO

5. If you decide that the evidence of Defendant's mental retardation is a mitigating circumstance, you must not give it an aggravating effect.

6. Thus, if in your judgment, the evidence of Defendant's mental retardation independently calls for a life sentence even though the evidence also tends to support a 'yes' answer to either Special Issue #1 or Special Issue #2, you must not answer the following Issue 'no,' but rather you either answer it 'yes.' or you may use it as a basis for a vote for mercy and write the word 'life' in your verdict form.

7. We the jury find that the mitigating circumstances of Defendant's mental retardation should result in a sentence of life.

_____ YES _____ NO

[7] The trial court also refused appellant's eleventh requested instruction. This requested instruction, not expressly tailored to mental retardation, is of the jury nullification variety, authorizing the jury to answer one of the special issues "no," "if in your judgment, a mitigating circumstance independently calls for a life sentence even though it also tends to support a 'yes' answer to a Special Issue . . . . " The trial judge also refused this instruction on the basis that he had already granted appellant's first requested instruction.

The instruction the trial court gave is not sufficient, by itself, to apprise jurors that they could direct imposition of a life sentence irrespective of how they believed the evidence showed the special issues ought to be answered beyond a reasonable doubt. It seems to be a clumsy attempt at jury nullification; instructing that "any evidence which . . . mitigates against the imposition of the Death Penalty . . . may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is 'Yes' . . . . " What this does *not* clearly communicate is that evidence that has no rational bearing whatsoever on special issues, or has only a tendency to militate in favor of affirmative answers, may nevertheless, if it has an independent mitigating impact, serve as the basis for answering one or more of the special issues "no," in spite of the jurors' oaths to answer special issues honestly, and in accordance with what they believe the *relevant* evidence shows. It does *not* do enough to explain to jurors that they may, should they find it appropriate in their reasoned moral judgment: 1) use the fact of appellant's mental retardation as a reason to answer the first special issue "no" even if they do not find it prevented him from acting "deliberately"; or, 2) use that fact not only to answer the future dangerousness question "yes," but also, paradoxically, to answer it "no" instead. In short, it simply does not adequately inform the jury that it may assess a punishment less than death on account of appellant's mental retardation, irrespective of what the evidence shows as to deliberateness and future dangerousness. Gribble v. State, 808 S.W.2d 65, at 75 (Tex.Cr.App. 1990).

In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), the defendant complained that a jury charge in a capital punishment proceeding violated his Eighth Amendment rights. The charge instructed the jury that it could consider as a mitigating factor, pursuant to a subsequently amended California statute, *inter alia*, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Boyde complained that this instruction might be read so as to preclude jurors from considering evidence of his background and character unrelated to the circumstances of the crime itself. The United States Supreme Court announced:

> "The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

Id., U.S. at 380, S.Ct. at 1198, L.Ed.2d at 329. In *Boyde* the Court found there was not such a reasonable likelihood. First, the Court did not believe a jury would read the above instruction to preclude background and character evidence, reasoning that background and character may be understood to be "circumstances which extenuate[ ] the gravity of the crime." Moreover, even if the language might be susceptible to the interpretation Boyde complained of, the Court believed it unlikely the jury would have opted for that construction. The California capital punishment scheme requires the jury to balance statutory aggravating factors against mitigating factors, including

but not limited to those statutorily identified. Many of the statutorily enumerated mitigating factors have nothing to do with the offense on trial. Much of the punishment evidence presented to the jury in mitigation was in the nature of background and character evidence not directly related to the crime. The jury would not likely have believed that evidence was needlessly admitted. Moreover, the prosecutor argued not that such evidence had no relevance to the jury's balancing task, but simply that appellant's background and character evidence had little *weight*. Under these circumstances the Supreme Court could not conclude there was a reasonable likelihood the jury would understand the instructions to preclude consideration of that evidence.

In our view there was a reasonable likelihood that the jury in this case failed to understand that it was entitled to measure evidence of appellant's mental retardation for whatever mitigating weight it may have apart from the special issues. Unlike the California capital punishment scheme, former Article 37.071, supra, does not expressly accommodate mitigating evidence apart from its relevance to the special issues. Without more explanation, an instruction that baldly tells the jury it may consider evidence to be mitigating that seems either altogether irrelevant to the special issues, or relevant only in an aggravating sense, is likely in the context of our scheme to confound rather than inform. That counsel for appellant framed his entire final argument at punishment, albeit brief, in terms of the mitigating impact of appellant's retardation can only have served to compound the confusion. Without clearer guidance it seems likely the jury would limit its consideration of appellant's

mental retardation to whatever tendency it had to disprove deliberateness or to prove future dangerousness. Under *Penry* appellant was entitled to more.

We hold the instruction given in this cause did not adequately protect appellant's Eighth Amendment rights. Accordingly, we reverse the judgment of the trial court and remand the cause.[8]

CLINTON, Judge

(Delivered: October 28, 1992)
EN BANC
PUBLISH

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[8] The Legislature amended Article 44.29(c), V.A.C.C.P., in 1991 to provide that error committed only in the punishment phase of a capital murder prosecution will not result in a whole new trial, as before, but only in a new punishment proceeding. See Acts 1991, 72nd Leg., ch. 838, p. 2900, §1, eff. Sept. 1, 1991. However, the Legislature expressly made this amendment prospective only. *Id.*, §5. For this reason we need not address points of error alleging trial error in the guilt/innocence phase of trial.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

December 9, 1992

186TH DISTRICT COURT-89-CR-2912

RE: Case No. 70,983
STYLE: Rios, Joe, Jr.

On this day the State's Motion for Rehearing was denied.
(JUDGES CAMPBELL & WHITE WUOLD GRANT)

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: STEVEN C HILBIG
CRIMINAL DISTRICT ATTORNEY
BEXAR COUNTY CRIMINAL JUSTICE CTR
300 DEL OROSA SUITE 4025
SAN ANTONIO TX 78205

January 4, 1993

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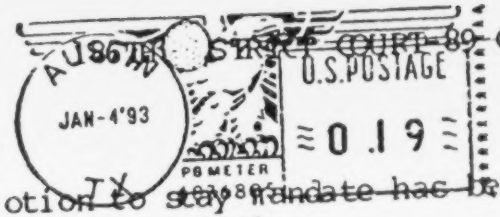

Case No. 70,983
Style: Rios, Joe, Jr.

On this day, the appellant's motion to stay mandate has been granted. The mandate has been stayed until 3-1-93.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

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SAN ANTONIO TX 78205-3030

NO. 89-CR-2912

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
VS.	§	186TH JUDICIAL
JOE RIOS, JR.	§	DISTRICT
	§	BEXAR COUNTY, TEXAS

CHARGE OF THE COURT ON PUNISHMENT

MEMBERS OF THE JURY:

By your verdict returned in this case, you have found the Defendant guilty of capital murder, as alleged in the indictment. You are instructed that a sentence of life or death is mandatory upon conviction of a capital offense. It now becomes your duty to determine, from all the evidence in this case, the answers to certain questions which are called in this charge special issues.

You are instructed that the State must prove each issue beyond a reasonable doubt.

As employed in the first special issue, the word deliberately' has a meaning different and distinct from the word 'intentionally' as that word was previously defined in the charge on guilt.

The term "deliberately," as used in special issue Number I is define [sic] as with careful consideration or deliberation; with full intent; not hastily or carelessly – as a deliberately formed purpose; with awareness of the consequences.

A person acts with intent with respect to the nature of his conduct, or to the result of his conduct, when it is

his conscious objective or desire to engage in the conduct or cause the result.

You are further instructed that in answering the issues submitted to you, you will confine yourselves, in answering the following issues to the conduct and acts of the defendant standing alone.

The special issues submitted to you are as follows:

SPECIAL ISSUE I

Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of Alex Delgado would result?

SPECIAL ISSUE II

Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

You will answer each of these special issues either "yes" or "no".

In order for the jury to answer a special issue "yes" the jurors must unanimously concur that the answer is "yes" beyond a reasonable doubt regarding that special issue.

Any juror who has a reasonable doubt that the answer should be "yes" as to a special issue shall vote "no" in the jury deliberations regarding that special issue. If ten or more jurors vote "no" in the jury deliberations as

to a special issue, then the answer of the jury is "no" regarding that special issue.

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second part of the trial wherein you are called upon to determine the special issues hereby submitted to you.

You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the defendant's reputation, character, or record, any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is "Yes"; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue "No."

You are instructed that as to any evidence offered by the state to assist you in deciding these Special Issues as to any unadjudicated acts of misconduct by defendant that you should not consider said evidence unless you find from the evidence, beyond a reasonable doubt, that the defendant did commit the said acts of misconduct.

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him nor prejudice him in any way. The

defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

During your deliberations you shall not consider, discuss or speculate upon what the effect of your answers to the above issues might be. Further, you are not to consider or discuss any possible action of the Board of Pardons and Paroles or of the governor or how long this defendant would be required to serve to satisfy a sentence of life imprisonment.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is herein given you, and be governed thereby.

Respectfully submitted,

/s/ James E. Barlow
JAMES E. BARLOW
Judge Presiding
(Filed Aug. 4, 1989)

NO. 89-CR-2912

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
VS.	§	186TH JUDICIAL
JOE RIOS, JR.	§	DISTRICT
	§	BEXAR COUNTY, TEXAS

VERDICT FORM

(Filed Aug. 4, 1989)

SPECIAL ISSUE I

Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of Alex Delgado would result?

ANSWER: YES

SPECIAL ISSUE II

Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: YES

We, the Jury, return in open Court the above answers as our answers to the issues submitted to us and the same is our verdict in this case.

/s/ Carol Wendel Harbour
Foreman of the Jury

Excerpts of Jury Charge
at the Guilt/Innocence Phase

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

DEFENDANT'S SPECIAL REQUESTED CHARGE AT PUNISHMENT NO. ELEVEN

(Filed August 3, 1989)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JOE RIOS, JR., DEFENDANT in the above styled and numbered cause by and through his attorney of record and pursuant to Article 36.16, Texas Code of Criminal Procedure, requests this court prior to the submission of the charge to the jury that the court submit the following Defendant's requested instruction:

1. When you deliberate about the questions posed in the Special Issues, you must consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance is any aspect of the defendant's character and record or the circumstances of the crime which, in fairness or mercy, calls for a sentence less than death. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. The law does not identify or limit the aspects of the defendant's character and record or the circumstances of the crime that are mitigating. The law does not impose a formula for determining how much weight a mitigating circumstance deserves. You are the sole judge of whether mitigating circumstances exist and if so, how much weight they deserve.

2. You may deliberate as a body about mitigating circumstances, but you are not required to reach an unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for

himself whether mitigating circumstances exist and, if so, how much weight they deserve.

3. You must consider and give mitigating effect to all of the mitigating circumstances, including those that have no relationship to any of the Special Issues. You must independently weigh each mitigating circumstance without reference to its relationship to the Special Issues.

4. There are two ways for you to give mitigating effect to the mitigating circumstances you have found. You may use a mitigating circumstance to answer a Special Issue "no" or you may use a mitigating circumstance as a basis for leniency even if you are persuaded that all of the Special Issues must be answered "yes." If you decide that all of the Special Issues must be answered "yes" and you also have found mitigating circumstances which call for a life sentence, you must not answer the Special Issues. Instead, to give effect to the mitigating circumstances, you must write the word "life" in each of the spaces on the verdict sheet where you would otherwise answer the Special Issues "yes" or "no." A verdict of "life" has the same effect as a verdict that answers at least one Special Issue "no."

5. If you decide that an aspect of the defendant's character and record or the circumstances of the crime is a mitigating circumstance, you must not give it aggravating effect. Thus, if in your judgment, a mitigating circumstance independently calls for a life sentence even though it also tends to support a "yes" answer to a Special Issue, you must not answer the Special Issue "yes," but rather you either answer it no or you may use

it as a basis for a vote for mercy and write the word "life" in your verdict form.

DEFENDANT'S SPECIAL REQUESTED CHARGE AT PUNISHMENT NO. TWENTY

(Filed August 3, 1989)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JOE RIOS, JR., DEFENDANT in the above styled and numbered cause by and through his attorney of record and pursuant to Article 36.16, Texas Code of Criminal Procedure, requests this court prior to the submission of the charge to the jury that the court submit the following Defendant's requested instruction:

1. When you deliberate about the questions posed in the Special Issues, you must consider any mitigating circumstances supported by the evidence presented in both phases of the trial. In this case, there was presented to you evidence that the Defendant was mentally retarded. You may consider such evidence as a mitigating circumstance in deciding the answers to the Special Issues.

2. A mitigating circumstance is any aspect of the defendant's character and record or the circumstances of the crime which, in fairness or mercy, calls for a sentence less than death.

3. You may deliberate as a body about mitigating circumstances but, you are not required to reach an unanimous verdict as to it's existence or weight.

Your are [sic] instructed that when you vote about whether mitigating circumstances exist and, if so, how much weight they deserve, you may vote "yes" if ten or more jurors believe that the mitigating circumstances exist or if ten or more jurors have a reasonable doubt that they exist.

You are further instructed that when you vote about whether mitigating circumstances should result in a sentence of life you may vote "yes" if ten or more jurors believe that the mitigating circumstances required a sentence of life or if ten or more jurors have a reasonable doubt thereof.

4. We the jury find that the evidence of Defendant's mental retardation is a mitigating circumstance.

_____ YES _____ NO

5. If you decide that the evidence of Defendant's mental retardation is a mitigating circumstance, you must not give it an aggravating effect.

6. Thus, if in your judgment, the evidence of Defendant's mental retardation independently calls for a life sentence even though the evidence also tends to support a "yes" answer to either Special Issue #1 or Special Issue #2, you must not answer the following Issue "no," but rather you either answer it "yes." or you may use it as a basis for a vote for mercy and write the word "life" in your verdict form.

7. We the jury find that the mitigating circumstances of Defendant's mental retardation should result in a sentence of life.

_____ YES _____ NO

DEFENDANT'S SPECIAL REQUESTED CHARGE AT PUNISHMENT NO. TWENTY-ONE

(Filed Aug. 3, 1989)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, JOE RIOS, JR., DEFENDANT in the above styled and numbered cause by and through his attorney of record and pursuant to Article 36.16, Texas Code of Criminal Procedure, requests this court prior to the submission of the charge to the jury that the court submit the following Defendant's requested instruction:

1. When you deliberate about the questions posed in the Special Issues, you must consider any mitigating circumstances supported by the evidence presented in both phases of the trial. In this case, there was presented to you evidence of Defendant's character for helping family and friends, his loving family, his religious convictions, his abuse as a child, his limited mental intelligence, and of his illiteracy. You may consider any such evidence as a mitigating circumstance in deciding the answers to the Special Issues.

2. A mitigating circumstance is any aspect of the defendant's character and record or the circumstances of the crime which, in fairness or mercy, calls for a sentence less than death.

3. You may deliberate as a body about mitigating circumstances but, you are not required to reach an [sic] unanimous verdict as to it's [sic] existence or weight.

You are instructed that when you vote about whether mitigating circumstances exist and, if so, how much weight they deserve, you may vote "yes" if ten or more

jurors believe that the mitigating circumstances exist or if ten or more jurors have a reasonable doubt that they exist.

You are further instructed that when you vote about whether mitigating circumstances should result in a sentence of life you may vote "yes" if ten or more jurors believe that the mitigating circumstances required a sentence of life or if ten or more jurors have a reasonable doubt thereof.

4. We the jury find that the evidence of Defendant's character for helping family and friends, his loving family, his religious convictions, his abuse as a child, his limited mental intelligence, and of his illiteracy is a mitigating circumstance.

_____ YES _____ NO

5. Thus, if in your judgment, the evidence of Defendant's mitigating evidence independently calls for a life sentence even though the evidence also tends to support a "yes" answer to either Special Issue #1 or Special Issue #2, you must not answer the following Issue "no," but rather you either answer it "yes." or you may use it as a basis for a vote for mercy and write the word "life" in your verdict form.

6. We the jury find that the mitigating circumstances of Defendant should result in a sentence of life.

_____ YES _____ NO

Art. 37.071. Procedure in Capital Case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) If a defendant is convicted of an offense under Section 19.03(a)(6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.

(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have

priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

§ 19.03 Capital Murder

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

. . . .

(6) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

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§ 19.02. Murder

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.